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No. 91-427

In The

Supreme Court of the United States

October Term, 1991

KENDALL STOUT,

Petitioner,

v.

BORG-WARNER CORPORATION, ET AL.,

Defendants,

FAIRCHILD-HILLER STRATOS
DIVISION OF FAIRCHILD INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari
To the United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Kendall Stout ignored explicit warnings, and in defiance of common sense, slipped his hand into the innards of an operating VEA4-3A military air conditioning unit. As a result, Stout's hand was injured by the blades of an extremely loud and powerful exhaust fan located inside the unit. The fan was securely separated from human contact by the VEA4-3A's side panels, but Stout ignored his Army training and warnings in the

unit's technical manuals by removing the panels while the unit was operating.

Respondent Fairchild-Hiller Stratos Division of Fairchild Industries, Inc.[1] ("Fairchild") designed and manufactured the VEA4-3A unit under the close supervision of Army engineers, and in strict compliance with highly detailed specifications that were reviewed, evaluated and approved by the Army. The VEA4-3A was specifically designed and solely used to maintain controlled atmospheric conditions inside the Army's Hawk missile radar repair shelters, which contain sensitive computers and radar systems. The VEA4-3A mounted on the side of the mobile Hawk shelters, and utilized the same fan design as that used by the Army in a predecessor model, the VEA4-3, for some ten years prior to the development of the VEA4-3A in the 1960's.

Fairchild also prepared a VEA4-3A technical manual pursuant to a separate Army contract. The manual was drafted according to precise Army specifications, and was reviewed and approved by the Army prior to acceptance. The VEA4-3A manual in Stout's possession at the time of his injury was a different version than that prepared by Fairchild, as the Army had revised and replaced the VEA4-3A manual in the 1970's without consulting or involving Fairchild.

Petitioner sought redress from Respondent for the injuries to his hand, contending Respondent defectively

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[1] In August, 1989, the assets of Respondent Fairchild Industries, Inc. were acquired from its parent, The Fairchild Corporation, by Fairchild Space and Defense Corporation, which is a subsidiary of MATRA Aerospace, Inc.

designed the VEA4-3A by failing to provide an internal protective screen over its fan blades. Petitioner also claimed that Respondent did not adequately warn the Army of the dangers posed by the VEA4-3A's fan. The courts below held that Petitioner was not entitled to such redress because Respondent proved by summary judgment that (1) reasonably precise specifications for the VEA4-3A and its fan were approved by the Army, (2) the VEA4-3A units manufactured by Respondent conformed to the approved specifications, and (3) Respondent warned the Army about the dangers in the use of the VEA4-3A that were known to Respondent but not to the Army. *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991). Respondent therefore satisfied the requirements of the military contractor defense under *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), and Respondent is entitled to share in the government's immunity from state tort liability for injuries resulting from the use of military equipment.

SUMMARY OF ARGUMENT

Petitioner raises three arguments in his application for certiorari. None identify any conflict between *Stout* and either *Boyle* or other circuit decisions. Petitioner disagrees with the Fifth Circuit's factual findings in its *de novo* review of the summary judgment evidence, but he fails to articulate any special or important reason for this Court to review the *Stout* opinion.

Petitioner first argues that *Stout* weakens the approval standard under *Boyle* and *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), *cert. denied*,

107 L.Ed.2d 317 (1989). However, *Stout* follows other circuit opinions in finding adequate government approval because the Army subjected Respondent's drawings and prototypes to substantive and meaningful review prior to approval.

Petitioner's second argument was not raised in the courts below, and therefore presents nothing for review. Petitioner points to the dictum in *Stout's* second footnote which, Petitioner admits, only implies that a failure to warn claim cannot survive alone if a defective design claim is defeated by the *Boyle* defense. The footnote only observes that Petitioner never raised a failure to warn claim as distinct from his defective design claim. *Stout*, 933 F.2d at 337, n.2. Any perceived conflict among the circuits on this issue is not reviewable in this case, since the Fifth Circuit did not decide anything pertaining to the survival of warning claims under *Boyle*.

Petitioner's third argument complains that the Fifth Circuit should not have found the fan to be an open and obvious danger because moving fan blades are invisible to the naked eye. This argument fails to identify any conflict among the circuits or with *Boyle*. The fan was extremely powerful, noisy, and could shoot objects off its exhaust port like a cannon. Several circuits have presumed military knowledge of equipment dangers where the military has had extensive experience with the equipment in question. The Army had over twenty years of use with the same fan design used in the VEA4-3 and the VEA4-3A. No warnings are required from a contractor where the danger is known to the military, and thus the Fifth Circuit properly found that *Boyle's* third element was met as a matter of law.

None of Petitioner's three contentions merit further review. There is no new, easier or different standard for government approval in *Stout*, nor does it conflict with other decisions in any other respect. The implications of a footnote's dictum does not merit the review of this Court, nor do the other misperceived errors suggested by Petitioner's three arguments. Stout's petition for writ of certiorari should be denied.

ARGUMENT

1. *Boyle's* First Element was Satisfied by the Army's Thorough Review.

Petitioner argues that "the Court of Appeals' opinion here has eliminated the requirement of discretion [from the government contractor defense], replacing it with a requirement of mere review." Petition, p. 10. Petitioner refers to the opinion's use of the terms "review", "critique" and "evaluation" as evidence that the Fifth Circuit has established a "new, relaxed standard" of "passive acceptance" that conflicts with the "*Trevino* rule" and *Boyle*. Petition, pp. 10-12. Petitioner equates the *Stout* opinion's finding of sufficient government approval with the "rubber stamp" acceptance rejected in *Trevino*, 865 F.2d 1474. Petition, p. 11.

There is no new standard, no conflict between the opinion below and *Trevino* or *Boyle*, nor does *Stout* permit "rubber stamp" approval. Instead, the Fifth Circuit found that the Army conducted a substantive review and evaluation of the design of the VEA4-3A that more than satisfied *Boyle's* requirement of governmental approval of reasonably precise specifications. *Stout*, 933 F.2d at

335-36. The *Stout* opinion's use of the terms "review" and "evaluation" demonstrates harmony with *Boyle* and *Trevino*, rather than divergence.

Even Petitioner describe's *Trevino's* analysis of the approval requirement with the same terms: "[o]nce the discretion has been delegated . . . [a]pproval . . . requires substantive *evaluation* and *review* of the contractor's design choices." Petition, p. 8 (emphasis added). Again, Petitioner refers to evaluation as necessary for *Boyle's* approval: "it is only the exercise of this discretion, whether it be in choosing a design feature itself, or in *evaluating* a feature chosen by the contractor, that reaches the required level of approval of reasonably precise specifications." Petition, p. 9 (emphasis added).

In this case, the Army's in depth evaluation of a feature (the fan) constitutes an exercise of discretion sufficient to establish the government contractor defense. The record establishes that the Army was actively involved in the design process of the VEA4-3A from the very start. See, e.g., R.I, pp. 114-16; R.II, Buckingham's Depo., pp. 14-17. It conducted a step-by-step review and evaluation of the VEA4-3A design, including the fan feature in particular, which satisfies even Petitioner's definition of approval.

(a) Other circuits have found sufficient government approval under similar facts. Indeed, meaningful review and participation has been the standard in virtually every circuit decision construing "government approval" under *Boyle*. For example, in *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989), *cert. denied*, 108 L.Ed.2d 615 (1990), sufficient government approval was found where the contractor's designs were

"evaluated" and given "extensive review" by the government. Similarly, in *Kleeman v. McDonald-Douglas Corp.*, 890 F.2d 698, 701 (4th Cir. 1989), *cert. denied*, 109 L.Ed.2d 545 (1990), *Boyle's* first element was satisfied where "teams of Navy engineers met with each contractor for extended discussions," evidencing that the "government was a substantial participant."

In *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 948 n.4 (4th Cir. 1989), the "Navy reviewed . . . tested [and] scrutinized a mock-up" which "demonstrated Navy participation in design that amounts to more than rubber stamping." The Fourth Circuit's *Boyle* decision found that "back-and-forth discussions" are the "type of exchange of information [that] will normally suffice to establish governmental approval of the design in question," especially where the "Navy reviewed the mock-up and approved the design." *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986), *vacated and remanded*, 487 U.S. 500, 514 (1988).

Each of these cases detail an approval process involving government review of specifications, drawings and prototypes virtually identical to that of the Respondent and the Army. For instance, the Army provided Respondent Fairchild with initial procurement specifications of the VEA4-3A, and required Respondent to refine these initial specifications into detailed design drawings. (R.I, p. 111; R.II, Buckingham Depo., pp. 9, 11-14). Respondent, over time, prepared (1) an initial engineering analysis, then (2) preliminary design layout drawings, and finally (3) detailed design drawings. (R.I, p. 113-14; R.II, Buckingham Depo., p. 15). The detailed drawings included Specification 699, which is a highly detailed, 35

page document solely dedicated to detailing the VEA4-3A fan design. (R.I, pp. 55, 57-91). Each refinement was submitted to the Army for review, evaluation and approval before the next level of refinement could be made, and each refinement was subject to any changes desired by the Army. (R.I, pp. 113-15; R.II, Buckingham Depo., p. 15).

A similar process is described in *Ramey*, 874 F.2d at 948 n.4, where initial government specifications were refined by a contractor, which were then reviewed and approved by the military. Fairchild's detailed design drawings, including the fan's Specification 699, were subjected to a critical design review conference similar to that described in *Harduvel*, 878 F.2d at 1320. This conference lasted several days, during which every component of the VEA4-3A was reviewed by Army engineers, and changes to the design were made by the Army. (R.I, pp. 55-56, 113-14; R.II, Buckingham Depo. pp. 15-16).

The VEA4-3A design process reflects the sort of "continuous back and forth" discussions between the contractor and government that constituted government approval in *Boyle*, 792 F.2d at 414, and *Harduvel*, 865 F.2d at 1480. Respondent exchanged every detail of information with the Army, and Army engineers provided their input in the design review conferences. (R.I, pp. 113-15). Through continual review of each stage of Fairchild's work, the Army supervised and controlled the VEA4-3A's design.

After the detailed design drawings had been reviewed and approved, the Army "froze" the design, and Respondent was required to build preproduction

prototype models without deviation from the approved design. (R.I, p. 114; R.II, pp. 15-16). The prototypes underwent extensive testing for several months by the Army, independent testing facilities and Respondent. Every aspect of the VEA4-3A design was analyzed and evaluated by the Army during that time. (R.I., pp. 55-56, 114; R.II, Buckingham Depo., pp. 33-34).

The Army then spent approximately another month reviewing and evaluating the test results. (R.I., p. 114). Similar to *Kleeman*, 890 F.2d at 701, and *Ramey*, 874 F.2d at 948, n.4, the testing procedures, nature of the tests, and the criteria for acceptance of the VEA4-3A were all controlled and dictated by the Army, which held the absolute right to reject or modify the design at any point in its development. (R.I., p. 114-15). Prototypes were also tested by the military in *Ramey*, 890 F.2d at 948, and in *Boyle*, 792 F.2d at 414-15, which those courts found "adequately demonstrated that the Navy approved reasonably detailed specifications."

It is difficult to conceive of a more thorough means of review than months of testing, or a more "precise specification" than a working prototype. Indeed, the same type of facts set out above were found sufficient to establish government approval in *Kleeman*, *Harduvel*, *Ramey* and *Boyle*, since "[i]t is the salient fact of *governmental participation* in the various stages of the [equipment's] development that establishes the military contractor defense. Indeed, *active governmental oversight* is relevant to all three elements of defendant's burden." *Kleeman*, 890 F.2d at 701 (emphasis added).

Boyle held that the government must "consider" the design choices made by the contractor. *Boyle*, 487 U.S. at 512. However, the government need not be the designer itself,[2] because "the design ultimately selected may well reflect a significant policy judgment by government officials whether or not the contractor rather than those [government] officials develop the design." *Boyle*, 487 U.S. at 513. The standard of active government review, participation and oversight established by *Kleeman*, *Harduvel*, *Ramey*, *Boyle*, and now *Stout*, is consistent with *Boyle*'s approval requirement and assures that the government has considered the design choices involved.

(b) Stout is factually distinguishable from Trevino. Petitioner's reliance on the "rubber stamp" language in *Trevino* is misplaced, since *Stout* is factually distinct from *Trevino*. The evidence in *Trevino* established that (1) the contractor did not comply with Navy specifications, and (2) the Navy did not conduct *any* review of the contractor's design at any point. *Trevino*, 865 F.2d 1474, 1480, 1486-87. As a result, the *Trevino* court held that the Navy official's signature of approval was merely a "rubber stamp" insufficient to constitute approval under *Boyle*. *Id.*

Trevino therefore articulates the extreme at which government *acceptance* does not satisfy the requirement of government *approval*. The *Trevino* court specifically noted

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[2] Petitioner mistakenly attaches significance to the notion that "the contractor, not the military, was wholly responsible for designing the unit." Petition, p. 5. *Boyle* requires review and approval, not that the military actually originate the design that is ultimately approved.

that "[i]t must be emphasized that the *absence of review* is critical in this case." *Trevino*, 856 F.2d at 1487, n.13 (emphasis added). Where there is review, there is an exercise of discretion. There is only the absence of discretion when the government "merely accept[s]" the contractor's work. *Trevino* never held, as Petitioner alleges, that "mere review" is insufficient. *Id.* at 1485.

Petitioner further misreads *Trevino* by arguing that it requires a specific, separate showing of the exercise of government discretion to satisfy *Boyle*'s first element. Petition, p. 8. Petitioner's "*Trevino* rule" has the effect of adding an unnecessary fourth element to the *Boyle* three-part test, since the fulfillment of the first two elements *is* the showing of governmental discretion. "The first two of these [elements] assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated – i.e., they assure that the design feature in question was considered by a government officer, and not merely by the contractor itself." *Boyle*, 487 U.S. at 512. There is no precedent in *Trevino* or elsewhere for Petitioner's requirement of a separate showing of discretion.

(c) The Army had extensive input in the design, and excluded Stout's suggested protective devise. Petitioner misstates the record by claiming (1) "nothing indicates . . . any modification or other input to the unit's design" by the Army, and (2) "the Army made no decision as to whether to include or exclude a safety device on the unit's fan."

First, the extensive input of the Army in the design process has already been described. (R.II, Buckingham Depo., pp. 15-16). Furthermore, the record establishes

that the design of the VEA4-3A fan that injured Stout was identical to the fan in the VEA4-3, which had been developed and used by the Army for ten years before the development of the VEA4-3A. (R.I, pp. 55, 115; R.II, Buckingham Depo., pp. 18-20, 41-43).

Respondent was given the task of redesigning the Army's VEA4-3. The preceding model's design therefore dictated much of the VEA4-3A design, leaving Respondent little discretion. (R.I, p. 113; R.II, Buckingham Depo., p. 18-20). Even the VEA4-3A itself was not substantially divergent from the VEA4-3, reinforcing the conclusion that the design was ultimately the Army's from the very start. (R.II, Buckingham Depo., pp. 19-20). Thus, the Army had substantial input in the unit's design.

Second, the Army did specifically decline to include the very safety device suggested by Petitioner. Indeed, after Petitioner sustained his injury, Chief Warrant Officer Allen Blietz, one of Petitioner's superiors, submitted a proposal to the Army Corps of Engineers at Fort Belvoir[3] for permission to install a safety screen next to the fan "so if anybody had to work inside with the turbine going, there was no possible way of getting any injuries from the turbine . . . but on the form I received back, they [the Army] said it wasn't feasible . . . and it would not be a necessary requirement." (R.II, Blietz Depo., pp. 20-21).

The Army therefore exercised a discretionary function by balancing "technical, military and even social considerations, including specifically the trade off

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[3] Petitioner was originally trained to service units similar to the VEA4-3A at Fort Belvoir. (R.II, Stout Depo., pp. 13-17).

between greater safety and greater combat effectiveness," in rejecting the protective safety screen as unfeasible and unnecessary. *Boyle*, 487 U.S. at 512. Robert Buckingham, one of the designers of the VEA4-3A, concluded that a protective screen such as the one suggested would not be feasible because "any close off of the inlet area of the fan would grossly affect the hot day design point performance of the air conditioning by restricting the air flow [such that] [i]t would make it inoperative on hot day conditions", such as where the outside temperature reached 125° Fahrenheit. (R.II, Buckingham Depo, pp. 46-47).

Since it was required that the VEA4-3A air conditioner be able to maintain stable atmospheric conditions within the Hawk missile repair shelter even under such extreme external weather, no protective screen was included in the design. The absence of such a screen was obvious to anyone reviewing the VEA4-3A's detailed drawings or the prototype, both of which were scrutinized by the Army. (R.II, Buckingham Depo., p. 17). To impose liability on Respondent for the Army's discretionary judgment that a protective screen would sacrifice military priorities in terms of the performance parameters required of the Hawk repair shelter, would be the very sort of "second guessing" that the government contractor defense is designed to prohibit. *Boyle*, 487 U.S. at 511.

The Army did not passively accept whatever design Fairchild developed. The record does not support Petitioner's comparison of *Stout*'s facts to those in *Trevino*. The Fifth Circuit followed *Boyle* and *Trevino* in specifically requiring a showing of meaningful, "substantive review

and evaluation" of the design, rather than mere acceptance to satisfy *Boyle*'s first element. *See Stout*, 933 F.2d at 335-36. There is no conflict between *Stout* and *Boyle* or *Trevino*, nor is there error necessitating further review.

2. The Survivability of a Failure to Warn Claim is not Raised by the *Stout* Decision.

In his second argument, Petitioner purports to show conflict between the *Stout* opinion's second footnote and the Second Circuit's opinion in *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626, 630-31 (2d Cir. 1990). Petitioner cites the *In re Asbestos Litigation* case for the proposition that a "failure to warn claim would be viable even in a situation precluding a design defect claim." Petition, p. 13. Petitioner contends *Stout*'s second footnote "implies" the contrary. Petitioner did not previously argue this point in the courts below, and thus it was not preserved for further appeal, nor was it considered by the Fifth Circuit. Further, there is no conflict even between the "implication" of the *Stout* opinion's footnote dictum and the Second Circuit's *In re: Asbestos Litigation* decision.

(a) Boyle applies to failure to warn claims. A claim alleging the absence of adequate warnings is equally susceptible to the government contractor defense as a defective design claim. *Garner v. Santoro*, 865 F.2d 629, 635 (5th Cir. 1989); *Bynum v. FMC Corp.*, 770 F.2d 556, 574 n.4 (5th Cir. 1985). *In re Asbestos Litigation* is not to the contrary. The Second Circuit merely observed that the government contractor defense would not displace state tort warning law where the government exercised *no*

control and placed *no* requirements on the contractor in regard to warning labels. 897 F.2d at 631.

The *In re Asbestos Litigation* decision even cited favorably *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988), and explained that "the scope of Governmental control over the content of the repair manual in *Nicholson* supported the conclusion that the Government's specifications left no room for any addition [of warnings] by the manufacturer." *Id.* at 633, *citing Nicholson*, 697 F. Supp. at 604. The Second Circuit therefore approved of the application of the *Boyle* defense to displace a failure to warn claim pertaining to a military technical manual where the government exercised sufficient control overall. *Id.*

Stout is analogous to the facts in Nicholson, as Respondent was under strict limitations as to the content of the technical manuals, as dictated by the Army's detailed manual guidelines and contract. Petitioner mischaracterizes the record with his statement that "Fairchild was given *carte blanche* in drafting the technical manual." Petition, p. 5. The format of the manual, its organization, content, layout, subjects to be covered, specifications regarding any photographs, drawings or schematic diagrams, page size and other details were all controlled by detailed military specifications established by the Army pursuant to the separate technical manual contract. (R.I, p. 114).

The *In re Asbestos Litigation* decision remanded the question of *Boyle*'s applicability to the warning claim only because there was insufficient evidence of government control over the labeling of the asbestos cement packages.

By contrast, the evidence in *Stout* established the Army's involvement and control over the contents of the manual. For example, it was Buckingham's recollection that the Army reviewed the technical manual and made changes prior to approval. (R.II, Buckingham Depo., pp. 21-22).

After Fairchild fulfilled its obligation to supply a technical manual, the Army made further revisions on a routine basis. By 1970 the Army entirely replaced the manual prepared by Respondent. (R.II, Blietz Depo., p. 19, 24-25). It was the 1970 Army revised VEA4-3A manual that was available to Stout at the time of his injury, not the manual originally prepared by Respondent. (R.II, Blietz Depo., p. 37-38).

(b) Survival of a Warning Claim not Preserved for Appeal. Petitioner did not at any time assert a warning claim distinct from the design claim in the courts below. Nor did Petitioner argue that a failure to warn claim could survive the application of the government contractor defense where a defective design claim could not.

Petitioner's only arguments raising the warnings issue were limited to establishing that Respondent did not meet his summary judgment burden on the third *Boyle* element. For example, at page 13 of his Fifth Circuit appellant's brief, *In re Asbestos Litigation* is cited for the proposition that Fairchild must prove the government imposed specific warning requirements that conflicted with state law in order for *Boyle* to apply. From there, Petitioner argued that Respondent did not make such a showing of warning requirements, and "[f]or this reason, Fairchild did not meet *Boyle*'s third prong as a matter of

law, and summary judgment was improperly entered." Appellant's Brief, p. 15.

At no point in his appellant's brief did Stout contend that a failure to warn claim should survive if the defective design claim did not, nor did his brief even suggest that the failure to warn claim should be considered a separate claim apart from the defective design claim.[4] Accordingly, the Fifth Circuit's second footnote in *Stout*, which Petitioner now argues is in conflict with *Boyle* and *In re Asbestos Litigation*, refers to "this potential issue" as "unclear" in Stout's brief, and merely observes that "he does not contend that his failure to warn claim can survive the government contractor defense if his design claim does not." *Stout*, 933 F.2d at 337, n.2.

The Fifth Circuit similarly noted that Stout cited the *In re Asbestos Litigation* case "only to support his argument that Fairchild's summary judgment evidence did not meet *Boyle*'s third prong as a matter of law." *Id*. The Fifth Circuit properly did not address the issue, since it was not raised by Stout on appeal or at the district court. As a consequence, the footnote is dictum.

By approving *Nicholson*, the Second Circuit recognized that *Boyle* can preempt both design and warning claims. Since Petitioner has not previously suggested that

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[4] The Appellee's Brief filed by Fairchild asserted that "like the plaintiff in *Nicholson*, Stout asserts a failure to provide adequate warnings . . . but not any independent duty to warn * * * [and he] did not treat the inadequacy of warnings allegation as separate from the design defect allegation in his summary judgment briefs before the district court." Appellee's Brief, p. 16 and n.3. Stout never disputed this assertion.

his warning allegations are distinct from his design claim, and since his previous warning arguments were limited to opposing Respondent's proof of *Boyle's* third element, the survival of a warning claim is not implicated by the *Stout* decision. There can therefore be no conflict between the circuits on this issue, which was not preserved for review in any event.

(c) Open and Obvious Dangers Gave Army Knowledge Regardless of Warnings. Contrary to the last portion of Petitioner's second argument, there was no error or misstatement of Texas law by the Fifth Circuit when it stated "there is no duty to warn when the danger is obvious or actually known to the injured person." *Id.* Petitioner contends this legal precept does not apply to the *Boyle* doctrine because the duty to warn "extends to the government, while state tort law might apply to the individual." Petition, p. 13. However, if a danger is open and obvious to persons in general, then it would be obvious to the government as well, and the government should be charged with knowledge. This is significant because if the Army knew of the VEA4-3A fan's dangers, a warning by Respondent under *Boyle* would be unnecessary.

Several circuits have charged the military with knowledge of dangers where it has had considerable experience and opportunity to notice a danger which is readily apparent. For example, the *Trevino* court held that "because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers." *Trevino*, 865 F.2d at 1487. *See also, e.g., Boyle*, 792 F.2d at 414-15 (Navy awareness of

dangers presumed after approval of mockup and subsequent operational use for 13 years); and *Ramey*, 874 F.2d at 950 ("length and breadth of the [military's] experience with the component – and its decision to continue using it – amply establish government approval of the alleged design defects"), *citing Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).

The Army had actual knowledge of the danger of personal injury from contact with the VEA4-3A's moving parts prior to its sale to the Army. The Army had years of experience with the older VEA4-3, which had an unscreened fan design and location virtually identical to the VEA4-3A's. The Army even required the VEA4-3A fans to be interchangeable with those in the VEA4-3. *Stout*, 933 F.2d at 335; (R.I, pp. 55, 115; R.II, Buckingham Depo., pp. 19-20, 41). Finally, the Fifth Circuit noted that the VEA4-3 manual's warning of the dangers of moving parts also established the Army's knowledge of the dangers posed by the fan, which was one of the VEA4-3A's only two moving parts. *Id.* at 336-37; (R.I, p. 56).

The Army thoroughly inspected, reviewed, tested and evaluated the design drawings and the working preproduction prototypes of the VEA4-3A. (R.I, pp. 55-56, 115). As a consequence, the Army had knowledge of the tremendous power and suction of the fan, and the obvious risk of personal injury to anyone near the fan when the VEA4-3A's side panels were removed. Indeed, this open and obvious danger was evident to anyone who observed the noisy and powerful operation of the VEA4-3A condenser fan, which would "shoot like a gun" any object placed on the fan outlet. (R.II, Blietz Depo., pp.

23-24; R.II, Stout Depo., p. 83; R.II, Buckingham Depo., p. 31).

Petitioner argues that the Fifth Circuit erred by finding the fan an open and obvious danger because "this conclusion . . . ignores the well-known nature of moving blades . . . they are invisible." Petition, p. 15. If this "highly treacherous nature" of moving blades is "well-known" as Petitioner argues, then it still must be an open and obvious danger. Furthermore, a danger can be open and obvious even where it may be invisible to the naked eye. For example, a danger that is loud and can be sensed due to its extreme power can be "open and obvious."

Chief Blietz agreed that the fan made "a heck of a lot of noise" and "was not only loud, but it was *obviously* functioning under substantial power." (R.II, Blietz Depo; pp. 23-24) (emphasis added). Stout himself agreed that "the suction [was] so great [that] it would cause the hair on your head to pick up," and that prior to the accident, he knew that his hand would be injured if he "got caught up in the fan." (R.II, Stout Depo., pp. 83, 92).

There was no error in the Fifth Circuit's factual conclusion regarding the Army's knowledge. Petitioner's second argument that *Stout* "erroneously applied Texas tort law" is not the proper subject for the granting of a writ of certiorari, even assuming there was error. Nor are the "implication[s]" of *Stout's* footnote two, which is dictum.

3. Stout and the Army had Direct Knowledge of Danger, thus Respondent had no Duty to Warn.

Petitioner's third argument articulates no conflict between *Stout* and the *Boyle* doctrine. Instead, it only presents Petitioner's disagreement with the decisions by the courts below that *Boyle's* third element was proven as a matter of law. First, Petitioner points to his testimony that he had been trained to troubleshoot air conditioners by removing the side panels and running his hand along the copper refrigerant pipes while the unit was operating ("manual diagnosis"). Petitioner then asks the Court to leap to the conclusion that the Army must not have been aware of such dangers, as otherwise it would not have trained Stout to use such a dangerous procedure.[5] Petition, p. 14.

Such a conjectural inference does not rise to the level of competent summary judgment evidence that could controvert Respondent's evidence. Petitioner is only entitled to the benefit of those inferences which "the record as a whole" would "lead a rational trier of fact to find." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Such an inference is both unreasonable and unsupported by the actual record.

While Stout claims he was trained at Fort Belvoir to perform the manual diagnostic procedure, the evidence reflects that the procedure was only taught as appropriate

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[5] The Army's investigation of this incident concluded that Stout's own negligence caused the accident, an unlikely conclusion if his manual diagnosis method was the approved technique. (R.II, Blitz Depo., pp. 15-16 and Ex. 1).

for *horizontal* 38,000 BTU air conditioning units, and not for *vertical* 38,000 BTU air conditioner units such as the VEA4-3A. (R.II, Stout Depo., pp. 15-17, 26-31). The fan design and operation differs greatly between horizontal and vertical units (R.I, Stout Depo., pp. 16, 23), and Petitioner was never trained to perform the manual diagnosis method on a VEA4-3A during his training at Fort Belvoir or during his Army career at Schweinfurt, Germany and Fort Bliss. (R.II, Stout Depo., pp. 31, 52, 62).

Stout was warned by his Army instructor at Fort Belvoir to not get his hand caught in the fan when doing maintenance on 38,000 BTU air conditioners while they were operating, and he admits that he knew the VEA4-3A's fan posed such a danger. (R.II, Stout Depo., pp. 53, 83). Petitioner now dismisses his instructor's warning as merely a "general instruction," (Petition, p. 15), yet it was precisely Stout's failure to heed this warning that resulted in his injury.

Both courts below found persuasive Petitioner's admission that he knew the fan was dangerous and that he could be injured by it. *Stout*, 933 F.2d at 337; (R.I., Memorandum Opinion, p. 24). The Fifth Circuit noted that Stout's admission that his instructor warned him about the dangers posed by the fan demonstrated "the Army's undisputed knowledge of the risks involved in repairing the unit in [that] manner." *Id.* Petitioner neglects to explain how this conclusion is in error. Further, the Fifth Circuit noted that "the Army must be charged with knowledge of the obvious risk that the exposed fan posed . . . " because "[t]he unit was so powerful that it would propel any object placed on the fan outlet like a shell from a cannon." *Id.* If the Army had

knowledge, then the *Boyle* defense applies whether Stout knew or not.

Petitioner misstates the record by asserting that "Buckingham acknowledged that he knew precisely the risk involved in the strong fan pulling a repair person's hand or arm into the blades." Petition, p. 5. Petitioner suggests that Fairchild was aware of the manual diagnosis method and its dangers, but failed to warn the Army. However, Fairchild was not aware, and Buckingham never so testified.

Instead, Buckingham stated there was no productive reason for Stout's method of searching for "clogs" in the system, and testified that "you certainly wouldn't find it [the clog] by putting your hands in there and feeling anything." (R.II, Buckingham Depo., pp. 38-40). Buckingham merely stated that Stout's repair procedure was improper, extremely dangerous and contrary to the warnings given by Fairchild's technical manual. (R.II, Buckingham Depo., pp. 38-40). He never testified that he knew of Stout's manual repair method at the time the manual was written, or even before this lawsuit was brought.

It is also undisputed that Respondent had no involvement in the training of air conditioning technicians, nor in recommending the specific procedures to be used to maintain the units other than that found in the technical manuals. (R.I, pp. 114-15). The manual does prescribe a safe method of checking for coolant clogs, which excludes Stout's method. (R.II, Buckingham Depo., pp. 37-40).

Petitioner also takes exception to the Fifth Circuit's conclusion that the warnings in the VEA4-3 and VEA4-3A

technical manuals adequately put the Army and/or Stout on notice of the fan's dangers. Petition, p. 15. Petitioner misstates the record by contending that the "only warning . . . went to the danger of electric shock . . . [which] the government never interpreted [as] . . . a warning of . . . its moving fan." Petition, P. 5. The VEA4-3's technical manual specifically warned to "[a]lways operate the air conditioner with all panels tightly secured to prevent personal contact with electrical components *or moving parts.*" (R.I, Memorandum Opinion, pp. 23, 24; R.I, pp. 56, 97-99, 115; Buckingham Depo., pp. 49, 50) (emphasis added). Thus, the government had to know of the danger posed by the moving fan.

Similarly, the VEA4-3A's technical manual warns that "Before removing or installing any panel assembly, disconnect the power source from the air conditioner." (R.I, pp. 55, 56, ~~115~~; R.II, Buckingham Depo., pp. 11-13, 28-29). This warning prohibits the manual diagnosis method which Petitioner used, since he placed his hand inside the unit after the panels had been removed, with the power connected and the fan running.

Even assuming Petitioner raised a failure to warn claim, the uncontroverted summary judgment evidence established as a matter of law that both Stout and the Army had ample warning and knowledge of the fan's danger. There are no fact questions raised by the record, nor does the *Stout* opinion conflict with *Boyle* in its finding that the undisputed facts established *Boyle's* third element. Petitioner's arguments are factually oriented and present no question of law suitable for this Court's review.

CONCLUSION

Petitioner's arguments present contentions limited to the factual findings by the courts below, from what was a virtually uncontroverted summary judgment record. No question of law is at issue in this case that justifies the grant of a writ of certiorari. Petitioner has failed to sustain his burden of establishing that there are special and important reasons for the granting of a writ of certiorari, and his Petition should be denied.

Respectfully submitted,

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